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No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

76-894

ANDREW P. SCHOTT, JR., JOHN L. LEE, and JAMES E. SUTTON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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In the Supreme Court of the United States

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No.

ANDREW P. SCHOTT, JR., JOHN L. LEE, and JAMES E. SUTTON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Petitioners, Andrew P. Schott, Jr., John L. Lee, and James E. Sutton, respectfully pray that a Writ of Certiorari be issued to the Appellate Court of Illinois, Second District, to review its decision affirming judgments of conviction in the 15th Judicial Circuit Court, Lee County, Illinois, adjudging petitioners guilty of the offenses of armed robbery and aggravated battery.

Judgment and Opinion Below

On June 7, 1976, the Illinois Appellate Court, Second District, rendered an opinion affirming petitioners' convictions, No. 75-8, reported at 39 Ill. App. 3d 266, 350 N.E. 2d 49. A copy of the Appellate Court's opinion is attached hereto as Appendix A. A timely petition for rehearing was denied on July 16, 1976 (App. B), and a petition for leave to appeal to the Illinois Supreme Court, timely filed, was denied on September 29, 1976 (No. 48775). (App. C)

Jurisdiction of this Court

The judgment sought to be reviewed (the Illinois Supreme Court's denial of the petition for leave to appeal) was entered on September 29, 1976. This petition for Writ of Certiorari is filed within 90 days from said denial. Jurisdiction of this Court is invoked under Title 28, U.S. Code, sec. 1257(3), and Rule 22 of the Rules of this Court.

Questions Presented for Review

1. Were petitioners deprived of their constitutional right to effective assistance of counsel?

(A) Should this Court grant Certiorari in order to re-examine the minimum due process standards applicable to determining the minimum caliber of professional legal representation which the Constitution requires the States to assure defendants in criminal trials?

(B) Is not the question whether a federal constitutional right was waived itself a federal question, such that this Court should look beyond the conclusions of the Appellate Court that certain such issues were waived for failure to be raised or preserved below? Alternatively, if such ordinarily would constitute waiver, can this doctrine constitutionally be applied in the face of serious and substantial allegations attacking the competency and effectiveness of counsel, where part of the grounds for attacking counsel's competency rests on his failure to have taken various appropriate actions at trial, including the preservation of such questions for review?

2. Was prejudicial publicity about petitioner Schott's arrest during the trial responsible for depriving petitioners of a fair trial in derogation of their constitutional rights? Was the method of jury interrogation adopted by the trial judge inconsistent with the federally required due process standards heretofore enunciated by this Court?

3. Were petitioners' Fourth Amendment rights against unreasonable search and seizure violated where they were stopped in a car on the highway solely on the basis of a police radio message containing a description not sufficiently similar to them and their car to justify a lawful "stop" or arrest, and physical evidence seized as a direct result of that arrest was used at their trial to convict them?

Constitutional Provisions Involved

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .; . . . and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1 . . . [N]or shall any State deprive any person of . . . liberty . . . without due process of law; . . ."

Raising the Federal Questions Below

The Fourth Amendment question concerning the stop and search of the car in which petitioners were riding was raised in the trial court by way of a pre-trial motion to suppress evidence. (C. 19-20, 22-54) The motion was denied. (C. 56A-58)

The due process claim concerning the prejudicial publicity and its effect on the jurors upon petitioner Schott's arrest for an unrelated charge during trial was raised in the trial court. (C. 221)

Both the above issues were presented to the Appellate Court and Illinois Supreme Court, which courts rejected same by affirming and by denying leave to appeal, respectively. (Apps. A & C)

The Sixth Amendment and due process issue regarding effective assistance of counsel at trial was first presented to the State courts on appeal to the Appellate Court, when petitioners were represented for the first time by counsel other than trial counsel. It also was presented to the Illinois Supreme Court in the petition for leave to appeal.

STATEMENT OF THE CASE

Petitioners, Andrew P. Schott, Jr., John L. Lee, and James E. Sutton were each indicted in identical seven-count indictments (74-1CF-82, -77, and -87, respectively (C. 7-15) [1] charging six counts of armed robbery and one

[1] "C." refers to the Common Law Record which includes both the Transcript of Proceedings at Trial, (C. 120-335), and the Transcript of Proceedings Upon the Motion to Suppress Evidence.

count of aggravated battery. Counts 1 through 6 alleged that on January 4, 1974, in Lee County, Illinois, petitioners committed armed robbery, in that each took property consisting of U.S. Currency (and, additionally, in Count 3 only, guns) from each of six named individuals, respectively,[2] while armed with a dangerous weapon, in violation of Sec. 18-2, Chap. 38, Ill. Rev. Stat. Count 7 alleged that on the same date, petitioners knowingly, without legal justification, committed a battery on Randy C. Hacker, by causing him bodily harm, and in committing said battery used a deadly weapon, to wit, a gun in violation of Sec. 12-4, Chap. 38, Ill. Rev. Stat.[3]

Petitioners' pre-trial motion to suppress physical evidence (C. 19-20) was denied (C. 56A-58) after an evidentiary hearing (C. 22-54).

Following the presentation of evidence to a jury, Count 4 was nolle prossed on motion of the State (C. 270-71).[4] The jury found petitioners guilty on the remaining counts (Counts 1, 2, 3, 5, 6 and 7; C. 97-102), and the court set aside the convictions for aggravated battery. (Count 7; C. 357, 364)

Petitioners' motions for directed verdict at the close of the State's case (C. 269-71) and for a new trial (C. 340-50) were denied.

[2] Derek Hunter, Daniel I. Quigley, David R. Jacobs, H. Dean Pratt, Remigio Jiminez, and Tom Petitti, respectively.

[3] Andrew P. Schott, Jr., John L. Lee and James E. Sutton were charged in identical seven-count indictments (Nos. 74 1CF-82, 74 1CF-77 and 74 1CF87, respectively), and trial thereon was consolidated. (C. 23)

[4] The alleged victim of the robbery charged in Count 4, H. Dean Pratt, did not appear to testify at trial.

The court sentenced each petitioner to 6 to 18 years imprisonment upon each of Counts 1, 2, 3, 5 and 6, all sentences to run concurrently. (C. 355; *cf.* C. 356-57)

STATEMENT OF FACTS

The facts adduced at trial are set forth within the appellate court's opinion, App. A, and are not repeated here to avoid unnecessary duplication.

The facts concerning the motion to suppress are as follows:

Evidence at Hearing on Motion to Suppress Evidence (C. 22-54)

Lee County Deputy Sheriff Al Williams testified for the State that during the morning hours of January 4, 1974, he went to a farmhouse in Nelson, Ill., pursuant to a radio dispatch that an armed robbery had occurred there. Deputy Koppein was there. As a result of his investigation, Koppein made a radio dispatch:

> "To get information out that possibly there were four to five subjects involved and the car was supposedly a yellow Thunderbird with Iowa license plates, one subject was described as having a blue army jacket on and plaid pants." (C. 24)

This dispatch was sent out about 1:45 a.m. (C. 25)

On cross-examination, Williams testified that other than the description of an army type jacket and plaid pants, he had no description of the four to five subjects at that time, and that part of the description was that the vehicle involved bore Iowa plates.

State Trooper Marvin E. Deusterhaus testified that about 1:50 a.m. on January 4, 1974 (C. 26), he was in

Bureau County at the junction of Routes 88 and I-80. At that time he received a radio dispatch that an armed robbery had occurred at Nelson, Ill. at 1:35 a.m. The details he received were as follows:

> "It was with reference to the armed robbery, four to five white male subjects driving a late model Ford Thunderbird, probably 1973, with Iowa plates, possibly, one of the subjects was described as wearing a blue army type jacket with plaid pants." (C. 27)

He saw a yellow Thunderbird on 88 approaching I-80, followed it to Buda, Ill., then stopped it. The car he stopped had a total of 3 occupants, (not four or five), including the driver; was white over yellow, not yellow; and bore Illinois, not Iowa, plates. (C. 27, 36) Petitioner Schott wore plaid pants, but his light blue navy type shirt did not resemble an army jacket, and he wore no coat. (C. 39)

The driver, petitioner Schott, came to the police vehicle at Deusterhaus' request; was fully cooperative; produced drivers' license and vehicle registration; and nothing was seized from him. (C. 36-37) After other officers arrived following Deusterhaus' radio call, nothing (other than a pocket knife in defendant Sutton's rear pocket—the carrying which was not any violation of law (C. 38))—of an incriminatory nature was discovered, either on the persons of any of the three or in the body of the vehicle following a thorough search. (C. 41-42, 46-47, 51)

After locating the key to the trunk of the car after the car had already been towed and was in police custody at the Bureau County Jail, (C. 32-33, 43) while petitioners were in custody and some 2½ hours or more following the initial "stop," Deusterhaus and Trooper Hanna searched the trunk, finding numerous items (all the items enumer-

ated on the list comprising State's Exhibit 4 at the pre trial hearing, with the exception of three pairs of gloves, a knife, and three coats—quantities of marijuana and weapons were found in the trunk). (C. 41-42, 46-47) (St. Ex. 4 is contained on an unnumbered page following C. 56 and a duplicate appears at C. 73-74.)

There was no warrant to search the trunk; no one gave consent; and none of the individuals did anything unusual or suspicious prior to Deusterhaus' placing of petitioners under arrest. (C. 41-43)

Trooper Hanna of the Illinois State Police testified that on January 4, 1974, he received a radio call to assist Deusterhaus just before 2 a.m. (C. 44-45) When he met Deusterhaus at Buda, Ill., he saw that Deusterhaus had one subject in the police car, and another Bureau County deputy had two others in another car, which was a white over yellow late model Thunderbird. A brown leather jacket in the front seat with $1357 in it, and a pair of gloves with "what we thought were blood stains" (C. 45) were seized from the car. After they arrived at the Bureau County Jail, petitioners were booked, and the vehicle was searched. (C. 46-47). Hanna did not observe any of the three men commit any crimes; there was no search warrant; no formal consent to search was obtained. (C. 47) The car had Illinois plates. (C. 48) None of the guns recovered were on the person of any of the three. (C. 49)

Deputy Schwarting, who was assisting Deusterhaus at the time and place in question, assisted in the search of the vehicle in Buda before the car was taken to the jail; money, a knife, coats and gloves were found in the initial search. (C. 50) None of the guns or ammunition listed on State's Ex. 4 were found inside the car; all were in the trunk. (C. 51) None of the petitioners was present when

the trunk was opened. There were no arrest warrants, no did the witness see them commit any crimes in his presence. (C. 52)

Petitioner Schott testified that he was stopped by Deusterhaus in Buda, that he was arrested for armed robbery and for no other alleged violations, and that he never consented to a search of his car. He was present when the interior of the car was searched in Buda, but not when the trunk was searched. Petitioner was driving south on Route 88 near its intersection with I-80 when the car was stopped. In answer to Deusterhaus' questions at the scene, he said he told him that he was returning to Pekin, Ill. and that he had been at the Ramada Inn near Rock Falls or Sterling on Route 88.

The State stipulated that there were no arrest or search warrants. (C. 54)

The pertinent facts concerning petitioners' due process-publicity claim and their contention that they were deprived of effective assistance of counsel at trial are set forth within the respective Points of the Argument which The jury found petitioners guilty on the remaining counts follows. (See pp. 18-21 & 12-14, respectively *infra*.)

REASONS FOR GRANTING THE WRIT

Prefatory Statement

In addition to arguing incompetence of trial counsel, petitioners presented nine arguments to the Appellate Court —five of which were deemed waived for purposes of appeal because not preserved below.

Yet, in discussing and dismissing our contention that trial counsel failed adequately to represent petitioners, that Court does not consider the impact of counsel's "waivers" upon the essential question whether petitioners were afforded effective assistance of counsel, as is their constitutional right.

In dealing with each of the issues not raised below, the Appellate Court (though finding waiver) does touch on the merits; and clearly, these issues are not by any means "frivolous."

It seems to us that where more than half the issues presented for review do not receive consideration on the merits because of the failings and omissions of counsel below—and even those questions raised were improperly presented and deemed not preserved—then petitioners have not received "reasonably effective assistance of counsel."

The Appellate Court here has considered petitioners' substantial contentions in a vacuum, and has avoided the essential question whether they were convicted following a trial which properly may be deemed constitutionally fair.

Violating the precept that appellate judges should not permit their own view of the evidence as "overwhelming" to prejudice their resolution of the issues, it appears they have done just that in the case at bar; because in their

collective judicial judgment, petitioners are, after all, "guilty," none of the rest matters.[5]

We thought it did matter.

This Court should exercise its power of discretionary review and grant certiorari to consider the important questions raised herein. Not the least of these questions involves the minimum standard of professional competence expected of trial attorneys.[6] It is time this Court took a hard look at what the State reviewing courts have been passing as competent representation, in the light of the standards applicable to other professions.

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[5] "In view of the Government's insistence that there is abundant evidence to indicate that . . . [defendant was guilty], it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials. . . .

". . . All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. . . . From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." Mr. Justice Frankfurter, speaking for the Court, in *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946).

[6] See Chief Justice Burger's enlightening article, *The Special Skil's of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice*, 42 FORDHAM L. REV. 227 (1973).

1.

Petitioners were deprived of their constitutional right to effective assistance of counsel.

A. This Court should grant certiorari in order to re-examine the minimum due process standards applicable to determining the minimum caliber of professional legal representation which the Constitution requires the States to assure defendants in criminal trials.

B. The question whether a federal constitutional right was waived is itself a federal question, such that this Court should look beyond the conclusions of the Appellate Court that certain issues were waived for failure to be raised or preserved below. Alternatively, if such ordinarily would constitute waiver, this doctrine cannot constitutionally be applied in the face of serious and substantial allegations attacking the competency and effectiveness of counsel, where part of the grounds for attacking counsel's competency rests on his failure to have taken various appropriate actions at trial, including the preservation of such questions for review.

Petitioners' retained trial counsel[7] not only failed to raise a number of issues raised on appeal, such that the Appellate Court deemed the issues not properly before it (*i.e.*, waived); additionally, even as to those issues which

[7] Clearly, the same constitutional standards must apply in ascertaining the effectiveness of both retained and appointed counsel. *Wilson* v. *Phend*, 417 F.2d 1197 (7 Cir. 1969); *Goodwin* v. *Cardwell*, 432 F.2d 521 (6 Cir. 1970); *Lee* v. *Hopper*, 499 F.2d 456 (5 Cir. 1974); *Moore* v. *United States*, 432 F.2d 730, 736-37 (3 Cir. 1970); *United States* v. *Marshall*, 488 F.2d 1169, 1192-93 (9 Cir. 1973).

trial counsel did call to the trial court's attention, he did not properly preserve these for appellate review.[8]

There were nine issues raised in the briefs—other than the incompetent-counsel issue. Although the appellate court ruled otherwise, its own Opinion demonstrates that the representation at trial level was of such low caliber as to amount to little or no representation at all.

For, indeed, the court correctly pointed out that, "It is to be noted at the outset that contentions number 5, 6, 7, 8 and 9 were not raised at the trial." (App. A, p. App. 5) But then, as to those issues *raised* at trial, the court itself demonstrated the low caliber of trial representation in the following particulars:

a. In discussing the claimed limitation of impeachment on the State's witness Jimenez, the Court pointed out, "However, Lira's testimony would still be inadmissible as impeachment because *no proper foundation was laid for such testimony. . .*" (App. A, p. App. 9) (Emphasis added.)

b. With respect to the argument at the appellate level that the trial court erred in refusing to allow Lira to testify to threats made to him by

[8] The failure properly to preserve those matters which were called to the trial court's attention cannot be dismissed as merely "tactical decisions"; for to the extent that the matters were raised and presented to the trial court, the decision *was* made to raise the issue. Thus, failure to *preserve* same for appellate review must be the result of counsel's lack of knowledge of, or lack of attention to, those legal rules concerning how to preserve matters for appeal. Such lack of knowledge of the law on the part of counsel amounts to constitutionally ineffective representation. See *People* v. *Ibarra*, 60 Cal.2d 460, 34 Cal. Rptr. 863, 386 P.2d 487 (1963). Failure to preserve issues for review has been recognized as ineffective assistance of counsel. See *Bruce* v. *United States*, 379 F.2d 113, 116-17 (D.C. Cir. 1967); *Scott* v. *United States*, 427 F.2d 609, 610 (D.C. Cir. 1970).

Jimenez, the Court stated, "*First, we find that by failing to make an offer of proof on this alleged incident, defendants have failed to properly* [*sic.*] *preserve the issue for review.*" (App. A, p. App. 9) (Emphasis added.)

c. With respect to the claim that State's witnesses violated the trial court's exclusion order, the court again found that trial counsel did not preserve petitioners' rights. For the opinion pointed out that merely because witnesses talk to each other, such does not warrant the claim of a mistrial, because "It is to be noted that *defense counsel did not inquire further* than as indicated above as to what discussion was had by the witness Jacobs with the prior witnesses." (App. A, p. App. 11) (Emphasis added.)

d. Regarding the publicity issue, the court stated: "[*N*]*or did trial counsel object* to the form of the inquiry by the court." (App. A, p. App. 13) (Emphasis added.)

Have we not now demonstrated that the substance of effective assistance of counsel was lacking? The Appellate Court so stated by setting out the specifics of trial counsel's gross ineptitude amounting to such low caliber of representation as to be no representation at all. Indeed, with these cumulative examples set out, and with the court's recognition of our claim on review that the errors set out in our original appellate Brief at points 5, 6, 7, 8 and 9 were not raised in the trial below—how much more need petitioners demonstrate to show conclusively they were deprived of their right to effective assistance of counsel?

The "formula" language—that is, that counsel is to be regarded as "adequate" and "competent" unless the proceedings were rendered no more than a farce, a sham or a mockery—is still purportedly adhered to in Illinois. (App. A, p. App. 17)

The test has been expanded by several Circuits, in cases finding inadequate assistance of counsel though the proceedings were *not* reduced to a farce or sham:

> "The governing standard is *reasonably effective assistance.* One method of determining whether counsel has rendered reasonably effective assistance is to ask whether the proceedings were a farce or mockery. The farce-mockery test is but one criterion for determining if an accused has received the constitutionally required minimum representation (reasonably effective assistance). . . . [citation omitted] *One may receive ineffective assistance of counsel even though the proceedings have not been a farce or mockery.*" *Herring* v. *Estelle*, 491 F.2d 125, 128, *rehearing denied*. 493 F.2d 664 (5 Cir. 1974) (reversing district court's denial of habeas corpus to State prisoner). (Emphasis added.)

Otherwise stated, by the Seventh Circuit: "[T]he Constitution guarantees a criminal defendant legal assistance which meets a minimum standard of professional representation." *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634, 641 (7 Cir. 1975).

Also rejecting the "farce-mockery" test as the sole criterion of incompetence is the Sixth Circuit. In *Beasley* v. *United States*, 491 F.2d 687, 692-96 (6 Cir. 1974), the court specifically rejected this standard, adopting instead a test of "rendering reasonably effective assistance." *Id.* at 696. *Beasley* contains a well-reasoned and thorough survey of the law in this area. The court noted that the Circuit which originally had formulated the farce-sham test has itself rejected it. *Bruce* v. *United States*, 379 F. 2d 113 (D.C. Cir. 1967), and *Scott* v. *United States*, 427 F.2d 609 (D.C. Cir. 1970), overruling *Diggs* v. *Welch*, 148 F.2d 667 (D.C. Cir. 1945). See 491 F.2d at 693-94.

The Third Circuit, too, no longer applies the "farce-mockery" rationale. In *Moore* v. *United States,* 432 F.2d 730, 736 (3 Cir. 1970), the court held that as regards both retained and court-appointed counsel,

> "In both cases, therefore, the standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place."[9]

Accord, West v. *Louisiana,* 478 F.2d 1026 (5 Cir. 1973).

In the case at bar, petitioners' counsel's representation at trial, considered as a whole,[10] was not reasonably effective assistance of counsel as is constitutionally required. Considering the Appellate Court's admissions of counsel's failure to have preserved for review matters raised at trial, as well as counsel's failure to have raised at all those matters contained in more than half the points in petitioners' original Brief on appeal, petitioners did not receive reasonably effective assistance.

Due to the serious problems posed to the administration of criminal justice by allegations of incompetent counsel, it is essential that this Court set down some ground rules for the State and federal courts to follow in dealing with due process claims both of State and federal prisoners. Indeed, one Court of Appeals has invited resolution of this sticky problem by this Court:

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[9] See Chief Justice Burger's article, cited in note 6 *supra.*

[10] On a claim of ineffective assistance of counsel, the totality of the alleged omissions and errors of counsel must be considered as a whole. See *United States* v. *Hammonds,* 425 F.2d 597, 604 (D.C. Cir. 1970); *Wilson* v. *Phend, supra* note 6, at 1199.

> "The Supreme Court, however, has never enunciated any clear standards for courts to follow in passing on claims of ineffective assistance of counsel. As a result, circuit courts, left without guidance, have groped for the correct prescription to apply." *McQueen* v. *Swenson,* 498 F.2d 207, 215 (8 Cir. 1974).[11]

To hold, as does the appellate court, that all matters not raised below and/or not properly preserved are waived on appeal, despite the serious allegations of ineffective counsel for failure to raise or preserve them, is to condone that which the cases agree violates whatever standard of effective assistance of counsel may be applied.[12]

Due process cannot countenance a finding of waiver in these circumstances.

The State procedural grounds utilized by the trial and reviewing courts herein to preclude petitioners from effective reliance on the issues raised on appeal surely do not bar this Court from considering the merits of their substantial contentions.

> "[This Court has] consistently held that the question of when and how defaults in compliance with State procedural rules can preclude our consideration of a federal question is itself a federal question." *Henry* v. *Mississippi,* 379 U.S. 443, 447 (1965).

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[11] See *McQueen* v. *Swenson, id.* at 214-17, collecting recent cases from various Circuits utilizing more liberal formulations than the "farce-mockery" test.

[12] See *Bruce* v. *United States; Scott* v. *United States;* and *Beasley* v. *United States,* all cited at p. 15, *supra.*

Moreover, counsel's defaults in such circumstances cannot amount to waiver by petitioners. See *Fay* v. *Noia,* 372 U.S. 391 (1963); *Jackson* v. *Denno,* 378 U.S. 368 (1964); *Worley* v. *Swenson,* 386 F.2d 186 (8 Cir. 1967); *United States ex rel. McLemore* v. *Russell,* 371 F.2d 554 (3 Cir. 1967); *Noble* v. *Sigler,* 351 F.2d 673 (8 Cir. 1965).

To delineate the minimum standards of professional competence expected of counsel defending persons accused of crime, this Court should accept the invitation of the Eighth Circuit to enunciate appropriate standards. Where the courts themselves decry the lack of standards, this Court must not hesitate to act. Certiorari should therefore be allowed.

2.

Prejudicial publicity about petitioner Schott's arrest during the trial was responsible for depriving petitioners of a fair trial in derogation of their constitutional rights. The method of jury interrogation adopted by the trial judge is inconsistent with the federally required due process standards heretofore enunciated by this Court.

During the course of the trial, petitioner Schott was arrested for an unrelated offense in another county—which charge was subsequently dropped. (C. 343) A sense of fairness on the part of the authorities would have indicated a withholding of such arrest until after the trial. But the arrest occurred, and was attended with front page newspaper reportage and extensive radio news coverage in the area. Defense counsel moved for an inquiry upon the unsequestered jury to determine the extent of their contamination. (C. 221) The court's inquiry was so phrased as to abdicate its high responsibility to insure petitioners a fair trial. And the question, being in the conjunctive, was so improperly phrased as not to comport with the decided cases on the subject.

The question to the jurors was: "Have any of you heard or read anything about this trial or anything about any of the defendants outside of the proceedings conducted

yesterday throughout the trial that caused you to form an opinion one way or the other?" (C. 222; see App. 13)

The court initially should have determined *only* whether any juror had read or heard anything outside of courtroom proceedings concerning the case or any of the petitioners; not, as here, whether any juror had read or heard anything extrajudicial "that caused you to form an opinion. . . ." The court had a duty to inquire, first, whether any of the jurors had been exposed to publicity, and second, if so, whether they could still be fair and impartial jurors. *Margoles* v. *United States*, 407 F.2d 727, 732-35 (7 Cir. 1969); *United States* v. *Dellinger*, 472 F.2d 340, 370-77 (7 Cir. 1972); *People* v. *Cain*, 36 Ill.2d 589, 224 N.E.2d 786, 790 (1967).

While it is possible that the jurors could have remained fair and impartial even if they read or heard publicity concerning petitioner Schott's arrest for a different charge while on trial in this cause, see *Irvin* v. *Dowd*, 366 U.S. 717, 722-23 (1961); *cf. Rideau* v. *Louisiana*, 373 U.S. 723 (1963), the trial judge's mode of proceeding here made it impossible objectively to ascertain the effect, if any, upon them of exposure to the publicity. By asking them whether they heard or read anything outside the court proceedings "that caused you to form an opinion," the court delegated to each juror what is (and can be) legally only the court's task: to ascertain each juror's ability to remain constitutionally "fair" despite exposure to publicity.

Due process requires that the trial judge, not the jurors themselves, must make this determination. That he did not, and they did, effectively deprived petitioners of that fair trial to which they are constitutionally entitled. *Irvin* v. *Dowd, supra.*

Where, as here, there is a possibility that jurors may have been influenced by extrajudicial material, it is improper for a reviewing court to speculate as to prejudicial effect. "[C]ourts will not speculate as to the amount of prejudice arising from information secured by a jury outside the courtroom." *Farese* v. *United States,* 428 F.2d 178, 180 (5 Cir. 1970).

The Appellate Court opined that the issue of improper procedure and improper question "was not raised in the trial court"; and further, ". . . nor did trial counsel object to the form of the inquiry by the court." (App. A, p. App. 13) And accordingly, the Court held that because of trial counsel's failure to do what was required to protect the constitutional rights of petitioners, the issue has been waived on appeal.[13]

In light of the argument advanced in Point 1, *supra,* asserting ineffective assistance of counsel at trial, the waiver question must not be concluded by the determination of the State reviewing court. See discussion and cases cited at p. 17, *supra.*

To insure that State courts give proper effect to the constitutional guarantee of an impartial jury, inherent in due process of law, certiorari should be allowed. This Court must step in to prevent trial judges from abdicating their responsibility objectively to determine whether exposure to prejudicial publicity has made it impossible for a juror to be fair and impartial, despite that juror's personal assessment of his own mental state. Certiorari should be allowed so this Court may remind that this determination is one which the trial judge, not the jurors themselves, must make in order to satisfy the rigorous constitutional requirement of trial by jury.

[13] The publicity issue itself, of course, was raised. Hence trial counsel's failure properly to preserve the issue as raised herein is an indication of his ineffectiveness, as urged in Point 1, *supra.*

3.

Petitioners' Fourth Amendment rights against unreasonable search and seizure were violated where they were stopped in a car on the highway solely on the basis of a police radio message containing a description not sufficiently similar to them and their car to justify a lawful "stop" or arrest, and physical evidence seized as a direct result of that arrest was used at their trial to convict them.[14]

Petitioner Schott was arrested after the car he was driving was "pulled over" by Officer Deusterhaus.[15] At the time he caused the car to stop, Deusterhaus had heard a police radio message that a yellow late model Thunderbird bearing Iowa license plates might contain 4 to 5 male individuals wanted in connection with an armed robbery some distance away about a half hour before. One of these persons was said to be dressed in plaid pants and a blue army-type jacket. The car Schott was driving was a white over yellow Thunderbird with Illinois, not Iowa, license plates, and contained a total of three persons, not 4 or 5. At the time Deusterhaus arrested petitioner Schott, he had not discovered anything suspicious or incriminating;

[14] At the outset, it should be noted that recent decisions of this Court expanding the right of police to search vehicles, in contradistinction to other places, have no effect on the argument raised herein; for our argument attacks the *initial* probable cause to stop and arrest petitioners.

[15] The facts and transcript references supporting the following account are set forth at pp. 6-9, *supra.*

Schott cooperated; he came to the squad car after stopping; he produced his driver's license and vehicle registration upon request, going from the squad car back to his own car to fetch it for the officer. After he arrested petitioner Schott, additional officers arrived, and the two occupants were also arrested and the car was searched, excepting the trunk; nothing incriminatory was found.

Clearly, Deusterhaus did not have probable cause to arrest petitioners. Suspicion he may legitimately have entertained; but this is *not* probable cause. Hence petitioners' arrest and the admission into evidence of the articles seized pursuant to the arrest violated their Fourth Amendment rights.

-A warrantless arrest is tested by standards no less stringent than those applicable to ascertain the validity of a warrant:

> "[T]he standards applicable to the factual basis supporting the officer's probable cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied with respect to the magistrate's assessment [as a prelude to issuing an arrest or search warrant.]" *Whiteley* v. *Warden*, 401 U.S. 560, 566 (1971).

At the time he placed petitioners under arrest, nothing incriminating had been discovered. And surely, the arrest cannot be validated ex post facto by what was (allegedly) subsequently discovered in the car's trunk, some 2 to 3 hours later, after petitioners were in custody and the car had been towed to the Bureau County Jail and impounded. *Henry* v. *United States*, 361 U.S. 98, 103-04 (1959), clearly holds that an arrest may not be justified by what a subsequent search discloses. *Accord, Rios* v. *United States*, 364 U.S. 253 (1930).

The officer conceded that he did not observe the vehicle he caused to pull over violate any traffic laws; the stop and arrest, and the subsequent search, were predicated *solely* upon the radio message containing a description of the persons wanted in connection with an armed robbery which supposedly took place some half hour earlier about 40 miles away. The discrepancies between the description given the officer and the actual appearance of petitioner Schott, of the other two occupants and of the vehicle were so great that the radio message alone cannot be said to constitute probable cause to arrest petitioners.

Certainly, officers have a right to rely and act upon official messages they receive by radio. See *Whiteley* v. *Warden, supra,* at 568. However, where in fact probable cause is lacking, that an arresting officer may have relied upon a radio message cannot serve to insulate the otherwise illegal arrest from constitutional challenge. *Ibid.*

The officer here was told that a yellow Thunderbird with Iowa license plates might contain 4 to 5 individuals involved in an armed robbery, one of whom was said to be wearing plaid pants and an army type jacket. (C. 24, 27) Petitioner Schott, while wearing plaid pants, was not wearing anything which resembled an army-type jacket. (C. 39)

This radio message did not give the officer probable cause to arrest the driver and passengers of a car containing a total of three persons, bearing Illinois plates, the driver of which happened to be wearing plaid pants.

Here, at the time Deusterhaus arrested petitioner Schott, the sole and only features of Schott which could be said to match the radio dispatch were that he was male, that he was wearing plaid pants, and that he was in a

partly yellow Thunderbird. Thus Schott did *not* sufficiently fit the description to render the arrest valid.[16]

In short, while the radio message might constitute probable cause for arresting a person matching the message's description of the occupants and driving in a car also matching said description, it did *not* constitute probable cause to arrest petitioners, who did not match the description, and who were in a car which did not match it either.

Without any evidentiary support in the record, the Appellate Court states that the arresting officer saw "an obviously distinctive type motor vehicle . . .", a late model yellow 1969 Thunderbird with a white top. (App. A, p. App. 5)[17] A Thunderbird is a Thunderbird; it is different from a Buick or a Ford or a Cadillac, but it is not distinctive from thousands of other Thunderbirds. We are unaware of any law permitting the Court to take "judicial notice" of what it denominates as "an obviously distinctive type motor vehicle." Some testimony should have been produced supportive of this judicial fact-finding made de hors the record.

[16] See *Mallory* v. *United States*, 354 U.S. 440 (1957), where this Court in dictum condemned the arrest of three persons for an offense known to have been committed by only one person, viewing such arrest as what amounted to a "fishing expedition." Converse', here, a stop of a car containing three persons, where the information conveyed to the officer stated that four or five were involved, similarly is tainted as being, not only without probable cause, but also, improperly, for investigation.

[17] The Appellate Court's characterization of the car as "distinctive" and "unusual" (App. A, p. App. 5) must be contrasted with petitioners' position that it is proper for a court judicially to notice what is a frequently used mode of dress, which latter argument specifically has received judicial approval. See *People* v. *Moore*, 6 Ill. App.3d 932, 287 N.E.2d 130, 134 n.2 (1 Dist. 1972), where, in evaluating identification evidence, the Appellate Court took judicial notice of what constitutes a frequently used mode of masculine dress, further stating that it is common knowledge that a frequently used mode of dress can be seen on more than one person in the same general area. The Court's characterization at bar, on the other hand, finds neither evidentiary nor judicial support.

Also, the Court seems to justify the search by what was found later, in impermissible boot-strap logic. Thus, we find the Court noting that the petitioners testified they were at the Dawson farm on the night and at the time in question. (App. A, p. App. 8) This cannot serve retroactively to justify the illegal stop in the first place. And clearly, the "stop" constituted an arrest. *Henry* v. *United States*, 361 U.S. 98, 103 (1958).

With respect to the claimed police statements that petitioners said they were in the "vicinity" of the Rock Falls-Sterling area at the time they were stopped, the Appellate Court has ignored entirely the map of the area. (App. D).[18] It shows the Rock Falls-Sterling area a long distance from the farm.

[18] App. D hereto, the map, was submitted as an Appendix, both to petitioners' Reply Brief in the Appellate Court, and to their Petition for Leave to Appeal in the Illinois Supreme Court. It is obvious therefrom that the Sterling-Rock Falls area is a large area, which surely cannot be said to be "in the area," App. 5, of Nelson. Indeed, Nelson is *not even in the same county* as the Sterling-Rock Falls area. Considering the expanse of the Sterling-Rock Falls area, it is *not* reasonable to assume that someone who says he has come from an unarticulated portion of that area had in fact "been in the area of the robbery at the time in question." (App. A, p. App. 5) Deusterhaus "determined," (App. A, p. App. 5), no such thing; *he merely suspected it.* Attention is further drawn to the local rural roads involved; one cannot go directly from Nelson to Buda (the area where defendants were apprehended) via any main thoroughfare.

To uphold the arrest and ensuing search herein amounts to judicial justification of unconstitutional conduct on the basis of the fruits of the search; it amounts to granting ex post facto authorization for improper police conduct because the officer's hunch materialized. The mandate of the Fourth Amendment cannot thus be thwarted and ignored; only by suppression of evidence so obtained can official compliance be fostered. *Mapp* v. *Ohio*, 367 U.S. 643, 651-52, 657-60 (1961). The purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).

Certiorari should therefore be allowed.

The trial court's refusal to suppress the evidence seized as a result of petitioners' unlawful arrest permitted unconstitutionally obtained evidence to be used against them. Petitioners' convictions should be reversed.[19]

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[19] Here, included in the evidence seized as a result of petitioners' arrest were the guns allegedly used during the robbery, as well as guns allegedly taken in the course thereof. See p. 8, *supra*. Thus the constitutional error cannot be deemed "harmless," regardless of this Court's assessment of the sufficiency of the other evidence to support conviction. See *Wrightson* v. *United States*, 222 F.2d 556, 561-62 (D.C. Cir. 1955). It is impossible for this Court to conclude beyond a reasonable doubt that the constitutional error herein was harmless, per *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

CONCLUSION

For the foregoing reasons, Certiorari should be allowed, and petitioners' convictions should be reversed, or reversed and remanded.

Respectfully submitted,

JULIUS LUCIUS ECHELES
CAROLYN JAFFE

Attorneys for Petitioners

APPENDIX

APPENDIX A

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

ANDREW P. SCHOTT, JR., JOHN L. LEE
and JAMES E. SUTTON,
Defendants-Appellants.

Appeal from the 15th Judicial Circuit,
Lee County, Illinois.

OPINION OF THE APPELLATE COURT
(Filed June 7, 1976.)

MR. PRESIDING JUSTICE GUILD delivered the opinion of the court:

The three defendents herein were each indicted for six counts of armed robbery against six different parties and a seventh count of aggravated battery committed on one Randy C. Hacker. Count IV of the indictments charging armed robbery of one H. D. Pratt was *nolle prossed* by the State as it appears in the record that Pratt had entered the armed services. The defendants were tried by a jury and found guilty of the five counts of armed robbery and the one count of aggravated battery. The trial court held that the aggravated battery was a "lesser offense" and set the conviction aside as to that offense. The court thereupon sentenced each of the three defendants to 6-18 years in the State Penitentiary as to each count of armed robbery with the sentences to run concurrently.

The evidence for the State was that on the night of January 3, 1974 Lana Beane and Randy C. Hacker were at the residence of one Doug Dawson on a farm in Nelson, Lee County, Illinois. About 9:30 in the evening a man came to the door, subsequently identified as the defendant John L. Lee, and stated that his car was in a ditch and asked to use the telephone. He was allowed to use the telephone and he then reentered the room where he produced a gun and told Randy C. Hacker and Lana Beane to lie down on the floor. Lee then opened the door and the two other defendants, subsequently identified as Andrew P. Schott, Jr. and James E. Sutton, entered the residence. They were disguised with nylon stockings placed over their heads. It further appears that Lee then placed a stocking over his head as well. All three men were armed. About 10:00 p.m. Derek Hunter and his wife Phyllis knocked at the door of the farmhouse and they were admitted. The three masked men then tied up and blindfolded Hunter with masking tape. Mrs. Hunter and Lana Beane were subsequently tied up and blindfolded. $220 was taken from Hunter. About 10:30 in the evening Tom Petitti, Dan Quigley, H. D. Pratt and Remigio "Ray" Jimenez arrived at the Dawson farmhouse in Quigley's car. Petitti went to the door and the other three remained in the car. A man with a nylon stocking over his head and with a gun in his hand took Petitti into the room where the other victims were sitting with their eyes taped and their hands tied. Money was taken from Petitti. Shortly thereafter Quigley, Pratt and Jimenez were ordered out of the car at gunpoint by a man with a mask and taken into the farmhouse. $22 was taken from Quigley and $160 was taken from Jimenez. All four were tied up and blindfolded with masking tape. About 11:30 in the evening Dave Jacobs, who resided at the Doug Dawson farm, arrived home. He was met at the door by Lee, taken into the room with the other victims, tied

up and blindfolded. About $1000 was taken from the person of Dave Jacobs. At the trial Remigio Jimenez identified the defendant Lee; Tom Petitti identified the defendant Schott; Lana Beane identified both defendant Sutton and defendant Lee; and Mrs. Hunter identified all three defendants.

About 1:30 in the morning of January 4, 1974 the three defendants left the farmhouse, leaving the above enumerated people tied and/or blindfolded in the farmhouse. The victims were able to free themselves from their bonds and called the police shortly after 1:30 a.m. An alert was sent out over the police radio describing the vehicle of the defendants as being a yellow 1969 Thunderbird and one of the occupants being described as wearing plaid pants and an Army-type jacket. The car also was described as having Iowa license plates. About 45 minutes later defendants were arrested by a State Trooper in Bureau County after having received the ISPRA message in reference to the armed robbery which occurred in Nelson, Illinois. The State Trooper stopped the vehicle of the three defendants, which was a yellow, 1969 Thunderbird with a white top. The defendants were handcuffed and taken to the Bureau County jail. The vehicle was removed to the police station and searched. In the trunk of the defendants' car the police officers found three handguns, four shotguns, a .22 caliber rifle in a case, and David Jacobs' Firearms Identification card. Marijuana was also found in the trunk of the car. The shotguns and rifle were subsequently identified by David Jacobs as being his property which was taken from the Dawson farmhouse during the robbery.

Prior to the trial the defendants filed a motion to suppress the evidence seized, including all the physical evidence found in the trunk of the defendants' car. The motion to suppress was denied.

At the trial the three defendants testified that defendant Schott didn't know how the guns could have gotten into his trunk and the other two defendants, likewise, disclaimed any knowledge of the firearms being in the trunk of the vehicle. The three defendants, in substance, testified that they knew Doug Dawson, the owner of the farmhouse where the robberies occurred; that they had gone there to see him and that they sat around and talked to all of the people above enumerated; and that they drank beer and smoked marijuana with the parties there. They all further testified that, inasmuch as Dawson did not return, they left at approximately 1:00 a.m., at the request of Dave Jacobs who stated to them that one of the parties thought one of them was a narcotic agent. At the time of the report of the robberies the victims stated that approximately $1503 had been taken from Petitti, Hunter, Quigley, Jimenez and Jacobs. $1384 was found in defendant Schott's coat. Schott testified that he had about $1350 in his coat and that he was going to use it to purchase drugs from Doug Dawson as soon as he returned from Chicago. However, at the time of his arrest Schott advised the State Trooper that the large sum was his and that he was in the real estate and construction business and, therefore, carried large sums of money.

The arresting officers testified that they had received the ISPRA message that the robbery had occurred, that the robbers had left in a late model yellow Thunderbird with Iowa license plates. The officer making the initial arrest testified that he observed the defendants' vehicle at 2:17 a.m. near Buda, Illinois; that it was a late model 1969 Thunderbird, yellow with a white top; and further testified that the information in the ISPRA message was that one of the robbers was wearing plaid pants and a blue Army-type jacket. When the officer stopped defendants'

vehicle the defendant Schott came back to the officer's car and the officer observed that he was wearing plaid pants with a blue Navy-type jacket. The three men were arrested and the Thunderbird was towed to the heated Bureau County Jail garage, it being—10°F. There a key was found between the hood and the fender of defendants' car which opened its trunk and the guns enumerated above, ammunition, firearms identification card and marijuana were found in the trunk. The three handguns were loaded and apparently the shotguns and rifle were not.

Defendants have raised ten issues in this appeal and we shall consider them in numerical order. It is to be noted at the outset that contentions number 5, 6, 7, 8 and 9 were not raised at the trial.

The first contention of the defendants is that the arresting officer did not have probable cause to arrest the defendants and that the admission into evidence of the articles seized from the trunk violated their constitutional rights. We do not agree. It is undisputed that a robbery had occurred and the message had gone out via ISPRA that three or more men had left the scene in a late model yellow Thunderbird shortly after 1:30 a.m. The arresting officer observed, at 2:17 a.m., a late model yellow 1969 Thunderbird with a white top going down the highway about 35 miles from the farmhouse. This is an obviously distinctive type motor vehicle and when defendant Schott exited the vehicle at the request of the arresting officer he was observed to be wearing the type of clothing which one of the robbers had worn at the time of the robbery, to-wit: plaid pants and a blue Navy-type jacket. The alleged discrepancy in the description, to-wit: that it was an "Army-type jacket" and that the car did not have Iowa plates but did have a white top, does not alter the fact that this unusual type vehicle was observed and the driver

thereof was wearing clothing which substantially fit the description given out over the police radio. Furthermore, the arresting officer determined that the motor vehicle and the occupants had been in the area of the robbery at the time in question. We, therefore, find that the arresting officer had probable cause to arrest the driver of the vehicle and the occupants thereof. Having probable cause to arrest the same, the removal of the motor vehicle to the heated Bureau County Jail garage and the subsequent search thereof was proper. In *People* v. *Hanna* (1969), 42 Ill.2d 323, 247 N.E.2d 610, we find a similar case to the one before us. Counsel for the defendant in that case, who is the same counsel who is involved in the case before us, raised this same issue, contending that probable cause did not exist for the warrantless arrest of the defendant therein and the ensuing search of the trunk of the car in the police station. The court in *Hanna* stated:

> "The rules that a warrantless arrest may be made on the basis of probable cause and that a warrantless search may be made incidental to a valid arrest have been too often stated by us to require extended reiteration here. [Citations.] Whether probable cause existed must be governed by the totality of the facts and the circumstances in each case." 42 Ill.2d at 328, 247 N.E.2d at 613.

In *Hanna* the defendants were arrested as a result of a radio message, the license plates did not match and the court held that there was ample justification for the officer stopping the car and questioning its occupants. The court went on to hold that the search of the motor vehicle at the police station likewise was proper. In *People* v. *Canaday* (1971), 49 Ill.2d 416, 275 N.E.2d 356, we again find a case where the defendant was arrested in an automobile which matched the description of the car used in a burglary

after the policeman received a radio report of the burglary. While it is true certain television sets were observed in the back seat of that automobile, the motor vehicle was taken to the Morgan County Sheriff's office and the trunk of the car was searched and stolen items found therein. A motion to suppress this evidence was made and denied and the Supreme Court of Illinois, in citing *Chambers* v. *Maroney* (1970), 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975, stated:

> "The Supreme Court rejected the contention that search without a warrant at the police station was improper. It was observed that the auto which could have been properly searched on the highway could as well be searched without a warrant at the police station, because the probable cause to search it continued. The movement of the vehicle to the station did not create any duty to secure a search warrant." *People* v. *Canaday* (1971), 49 Ill.2d at 421, 275 N.E.2d at 359.

In *Chambers* there was a police radio message that there had been a robbery by two men, one of them wearing a green sweater and the other a trench coat and driving a station wagon. When the station wagon was stopped in response to the police radio message, one of the men was wearing a green sweater and there was a trench coat in the car. Strikingly similar to *Chambers*, one of the robbers subsequently identified as the defendant Schott, was described in the police message as wearing plaid pants, indicated above, and the "Army" or Navy-type blue jacket. We therefore find that the possible discrepancies in the description of the motor vehicle and the license plates are insignificant in consideration of the other facts relating to the description of the vehicle and the occupants as indicated above.

When the defendant Schott was stopped by the police officer on the highway, the officer asked him where he had been and he replied that he had been in the Rock Falls-Sterling area. The second question of the officer dealt with the $1300 found in Schott's coat in the car. Defendants' second contention is that these statements were improperly admitted against the defendants as Schott had not yet been given his *Miranda* warnings. Examination of the record indicates that, in fact, Schott had been given his *Miranda* warnings prior to the question as to where the money in his coat came from. The first statement as to where he had been was a routine question and this issue has been decided by the Supreme Court as follows:

> "Thus, statements made in response to routine investigatory questions, asked during a brief initial period of non-coercive detention and designed to clarify a suspicious circumstance, have often been held admissible under *Miranda*. [Citations.]" *People* v. *Thompson* (1971), 48 Ill.2d 41, 44, 268 N.E.2d 369, 371.

See also, People v. *Caldwell* (1973), 55 Ill.2d 142, 152, 302 N.E.2d 69, 614. We find no error in this regard.

It is also to be noted that all three defendants took the stand and each not only testified they were in the Rock Falls-Sterling area but admitted that they were in the Dawson farm where the robbery took place on the night and time in question.

Defendants' [*sic.*] next object to the trial court's granting of the State's motion *in limine* made prior to the opening of the defendants' case to prevent the defendants from calling one Mr. Lira as a witness. Ray Jimenez, a State's witness, had earlier testified that he went to the Dawson farm to purchase a gun from Jacobs. The defendants made an offer of proof that Lira would testify that Jimenez had

told Lira that he was going to the Dawson farm to purchase LSD. Defendants contend that, in granting the motion *in limine,* the trial court thereby denied defendants an opportunity to impeach a State's witness; prevented the defendants from substantiating their theory that they had gone to the farm to purchase marijuana by using Lira's testimony to show that drugs were available at the farm; and finally, prevented defendants from showing that Jimenez threatened Lira when he saw him in the court building, as alleged by defense counsel.

Regarding the impeachment of Jimenez, we first note, contrary to the position of the State, that the proffered testimony of Lira, if used to impeach Jimenez by prior inconsistent statement, would not be hearsay since it would not be offered for the truth of the facts contained therein *(See, People* v. *Morgan* (1963), 28 Ill.2d 55, 190 N.E.2d 755.) However, Lira's testimony would still be inadmissible as impeachment because no proper foundation was laid for such testimony *(See, People* v. *Sanders* (1974), 56 Ill.2d 241, 306 N.E.2d 865), and additionally, it would be irrelevant and collateral to the issues of the case *(See, People* v. *Cappalla* (1926), 324 Ill. 11, 154 N.E. 451). Furthermore, defendants cannot complain that the exclusion of Lira's testimony denied them an opportunity to present testimony that drugs were available on the farm. If Lira's testimony were to be used for such a purpose, it would constitute inadmissible hearsay. While evidence of prior inconsistent statements of a witness is admissible to affect his credibility, such evidence does not afford substantive proof of the facts stated therein. *(See, People* v. *Morgan, supra.)* Thus, even if Lira's testimony were admitted, the trial court would have had a duty to instruct the jury as to the limited purpose for which such evidence was offered.

Defendants also argue that the trial court erred in refusing to allow Lira to testify to alleged threats made to him by Jimenez or to conduct a *voir dire* examination into this matter. First, we find that by failing to make an offer of proof on this alleged incident defendants have failed to properly preserve the issue for review. Notwithstanding this waiver, we find that testimony concerning the alleged hostility of Jimenez to Lira would be irrelevant to the issues of the case and, if used for purposes of impeaching Jimenez, collateral. In this regard, the statement of the court in *People* v. *Whitehead* (1966), 68 Ill.App.2d 488, 495, 216 N.E.2d 237, *rev'd. on other grounds,* 35 Ill.2d 501, 221 N.E.2d 256, in [*sic.*] instructive:

> "We have been shown no cases where the dislike of witnesses for one another was considered proper for exploration during a trial. We think that the feelings of Mrs. Whitfield [a State's witness] toward Mr. Washington [a defense witness] are too tangential to be admissible as evidence at this trial."

We, therefore, find no error in the trial court's granting of the motion *in limine* with regard to the testimony of the proffered witness, Lira.

The fourth contention of the defendants is that a witness violated the court's order excluding witnesses. In the cross examination of Dave Jacobs he said that he talked to some of the witnesses as they were sitting in the office waiting to be called to testify. Apparently all of the witnesses were in one room. In response to an inquiry by defense counsel as to whether he had talked to Lana Beane and Randy Hacker, who had previously testified, Jacobs stated that they told him what they had said in court. In response to the inquiry as to what they told him, he replied, "They told what happened . . . said it wasn't as difficult as they thought it would be." Defense counsel then asked, "Did

they tell you specifically what questions were asked?" and Jacobs replied, "Not that I remember. I don't believe they did." Defense counsel contends this is in violation of the order entered by the trial court at the commencement of the trial, which simply reads, "All witnesses must remain outside the courtroom until called to testify." At best this might possibly be considered an indirect violation of an order excluding witnesses. In *People* v. *Decker* (1974), 19 Ill.App.3d 86 at 93, 311 N.E.2d 228 at 234, a witness, who was not present at the time of the exclusion order, was advised by the State's Attorney as to the substance of a previous witness' testimony. That witness then took the stand and testified. As pointed out in *Decker,* the most the defendant had done was to assert an indirect violation of the exclusion order and had failed to show how the trial court had abused its discretion in permitting the testimony to stand. In the case before us, the court merely excluded the witness from the courtroom. It has been repeatedly held that even where the witness is in the courtroom in violation of the court's order, it is within the discretion of the trial court as to whether that witness may be permitted to testify. For a discussion of violations of an exclusion order where a witness remains in the courtroom attention is directed to 14 ALR3d 16, "Effect of Witness Violation of Order of Exclusion". The great weight of authority appears to be that it is within the discretion of the trial court to admit the testimony of a witness who remains in the courtroom in violation of the court's exclusion order. However, in the case before us that is not the factual situation. The mere fact that the witness did state that he had talked to witnesses who had previously testified does not, in itself, in view of the nature of the limited exclusion order herein referred to, warrant the finding that the court abused its discretion in not granting a mistrial as requested by the de-

fense counsel. It is to be noted that defense counsel did not inquire further than as indicated above as to what discussion was had by the witness Jacobs with the prior witnesses. We find no error in the court's denial of the motion for a mistrial on the basis of the above. *People* v. *Decker* (1974), 19 Ill.App.3d 86, 93, 311 N.E.2d 228, 234.

The fifth contention of the defendant [*sic.*] is that some, if not all, of the prosecution witnesses engaged in the use of controlled substances during the time of the alleged robbery. Examination of the record does not disclose this to be true. In the first place, it is to be noted that the only two witnesses who could have used marijuana were Randy Hacker and Lana Beane, the other witnesses were tied up and blindfolded upon entering the house. The testimony of Randy Hacker was that there was marijuana in a drawer in the premises. He denied that he had been smoking it prior to the entry of the three defendants in the premises Lana Beane testified that during the entire evening she smoked cigarettes. It is true, as defendants point out, that Hacker said he did smell cannabis burning and in answer to the inquiry on this point stated, "during the period the three subjects were there, yes." He was then asked if he smoked any and he replied, "No." Defendants contend that this evidence tended to demonstrate that the prosecution witnesses engaged in the use of cannabis on the night in question and that the court should have held a hearing to determine the effect, if any, of such use. The only two witnesses, as pointed out above, that could have possibly have [*sic.*] used marijuana denied the same and the other six witnesses obviously did not have the opportunity to use marijuana had they so desired. We find this contention without merit and note that the same was not raised during the trial.

The sixth contention of the defendants is that the trial court improperly inquired of the jurors whether any of them had read newspaper articles or heard a radio broadcast relating to one of the defendants. During the trial the defendant Schott was arrested for an unrelated offense. In response to the defendants' request the court interrogated the jurors as to whether or not any of them had read or heard of this arrest in the following manner:

> "Ladies and gentlemen of the jury, we are sorry for this delay, but it is something that can't be helped. I am going to make an inquiry of you, if your answer is in the affirmative, raise your hand, if not, don't do anything. My question is: Have any of you heard or read anything about this trial or anything about any of the defendants outside of the proceedings conducted yesterday throughout the trial that caused you to form an opinion one way or the other?
>
> None of you.
>
> Proceed with the trial."

Defendants contend that the proper procedure would have been for the court to inquire whether the jurors had been exposed to the publicity and, if so, could they still be fair and impartial jurors. We find that the interrogation of the jurors as to whether they had read or been prejudiced by any radio or newspaper publicity was sufficient. We further note that this issue was not raised in the trial court nor did trial counsel object to the form of the inquiry by the court. As pointed out in *People* v. *Curry* (1975), 56 Ill. 2d 162, 170, 306 N.E.2d 292, 296:

> "It is settled that specific objections to the admission of evidence waive all grounds not specified (*People* v. *Canaday*, 49 Ill.2d 416, 423-24) and that one may not raise on appeal a question which was not properly presented to the trial court. (*People* v. *Amerman*, 50 Ill.2d 196; *People* v. *O'Malley*, 404 Ill. 165.)

As in *Curry*, it is also to be noted that this issue was not raised in the post trial motion and the court in *Curry* held that "Under these circumstances we conclude the defendant has waived consideration of this issue on appeal." 56 Ill.2d at 170, 306 N.E.2d at 296.

Defendants' seventh contention is that physical evidence and testimony relative thereto was improperly admitted against them. The first contention in this regard is that the chain of custody of such evidence was not sufficiently established. This issue was not raised in the trial court and the Supreme Court has squarely passed upon this in *People* v. *Polk* (1960), 19 Ill.2d 310, 167 N.E.2d 185. As stated in *People* v. *Pruitt* (1974), 16 Ill.App.3d 930, 941, 307 N.E.2d 142, 152, in citing *People* v. *Polk:*

> "An objection to the failure to establish the chain of possession must be made at trial or it is waived on appeal."

We therefore find that this issue was waived. The second part of this contention deals with the admission of certain evidence which was not connected to the defendants. Numerous items were taken during the course of this armed robbery and were introduced as State's Exhibits 1 and 3 through 35. Many of the items consisted of the contents of three billfolds. One of the billfolds was found by a Mrs. Collins several weeks after the robbery. On February 21, 1974 a deputy sheriff went to the scene where the first billfold was found and recovered two more billfolds and many items which apparently had been in the billfolds, such as identification cards, social security cards, credit cards and the like. He also found a roll of masking tape. These items were found by the deputy alongside the road leading from the farmhouse or in a field nearby. Many of the items were identified by the victims as having been taken from them at the time of the robbery. It may be

true that the ownership of one or more of the items introduced was not shown. This was the basis of the defense counsel's objection to the admission of the items at the trial. As indicated above, several of the victims testified as to the taking of money from their persons by the defendants, totalling over $1300. This sum, $1384, was found in the coat of the defendant Schott. We find, in light of all of the evidence and the testimony at trial, that if the ownership of any of the miscellaneous contents of the billfolds found strewn upon the field or the three billfolds themselves were not sufficiently identified, that the admission of the same into evidence is harmless error.

The eighth contention of the defendants is that no scientific evidence was adduced that the masking tape found on defendant Lee's shoes or found by the roadway matched the tape used to blindfold the persons in the farmhouse. Likewise, defendants contend that the fact that Deputy Koppein testified, without objection, that there was blood on a pair of gloves identified as one of the defendants' required scientific proof that it was human blood and that it matched the blood of one of the victims. It is true that no scientific testimony was adduced as to either the tape or the blood, however, the fact remains that there was masking tape used to blindfold the victims and that masking tape was found on the shoe of defendant Lee when arrested. The fact also remains that the police officer stated that there was blood on one of the pair of gloves. The State concedes that the State's Attorney may have indicated in his closing arguments that the stains on the gloves were blood and that the evidence did not definitely support such a conclusion. On the other hand, we find that defense counsel in closing argument commented rather exhaustively on the blood on the gloves question, to-wit:

> "Based on the sole testimony of Mr. Hacker, no one else testified seeing any blood, save the blood on the gloves. . . . What about the blood on the gloves? We know they were sent to the crime lab, don't we, because that is where they came back from for blood analysis, weren't they? Did we hear anything about blood types, comparisons and identical *blood found* on those gloves as compared with the blood of Randy Hacker? Not one word." [Emphasis added.]

It is obvious that defense counsel conceded that the stains were, in fact, bloodstains, and chided the State for failure to connect up the blood type with that of the victim. We find, as the State points out, that Deputy Koppein's testimony as to his observation that the stains on the gloves were blood and the odd coincidence of finding masking tape on the shoe of defendant Lee, when masking tape was used to blindfold the victims, goes to the weight of the evidence rather than to its admissibility. Lastly, we expressly point out that this eighth contention was not raised in a post trial motion.

The ninth contention of the defendants deals with the statements of the State's Attorney in closing argument relative to the blood on defendant Sutton's gloves and the masking tape on defendant Lee's right shoe. The State's Attorney argues that this evidence was not necessary as they had nine people who were hostages, seven of whom testified. He further commented that the defendant could have subpoenaed the other two witnesses, to-wit: the victim Pratt and the owner of the farmhouse, Doug Dawson. Considering the case as a whole, we do not feel that the State's Attorney's comment was improper. The fact remains that seven witnesses did, in fact, testify substantially to the effect that they were robbed at gunpoint, blindfolded and tied up by the three defendants who were positively identified. Under these circumstances we feel that

the record as a whole is overwhelming as to the guilt of the defendants and that any error resulting from the State's Attorney's comments is harmless.

The last argument of the defendants is that trial counsel was incompetent in failing to raise the issues set forth above as defendants' contentions 5, 7, 8 and 9. While defendants were represented by privately retained counsel, defense counsel has pointed out that in *People* v. *Long* (1973), 12 Ill.App.3d 974, 979, 298 N.E.2d 784, 787, the appellate court there stated: ". . . a fair trial is not diluted by the fact that he chose his own trial counsel as distinguished from having been the recipient of court appointed counsel." Defense counsel fails to point out that in *People* v. *Long* the appellate court further held, "Incompetence of trial counsel warranting reversal must be of such character as to make the trial a farce." Furthermore, in the recent case of *People* v. *Torres* (1973), 54 Ill.2d 384, 391, 297 N.E.2d 142, 146, the Supreme Court of Illinois again stated that in the case of privately retained counsel that, "In such a case the court will not reverse a conviction because of the incompetency of counsel unless the representation is of such low caliber as to amount to no representation at all or reduces the court proceedings to a farce or a sham."

Defense counsel has pointed out to us that several Federal Circuit Courts of Appeal have rejected the "farce-mockery" test as the criterion of incompetence of trial counsel and have adopted the test as being that of "rendering reasonably effective assistance." Defendants admit that in the case at bar the trial was not a farce, a sham or a mockery of justice but that trial counsel's representation did not reasonably render effective assistance as required by the more enlightened case law. We do not adopt the Federal rule but do find that trial counsel did, in fact, render reasonably effective assistance. Defense counsel

vigorously represented his clients, moved to suppress the evidence, moved for discovery and, after a vigorous defense at the trial, moved for a new trial. Whether trial counsel agrees with appellate counsel as to the issues to be raised on appeal is a matter of legal discretion on the part of counsel. As the trial court pointed out, the evidence against the defendants herein was overwhelming. Under those circumstances we believe the defense counsel presented the best possible defense. We therefore affirm.

AFFIRM.

SEIDENFELD & HALLETT, J.J. concur.

APPENDIX B

STATE OF ILLINOIS
APPELLATE COURT SECOND DISTRICT
Elgin, Illinois 60120

July 16, 1976

The Court has this day entered the following Order in the case of:

Gen. No. 75-8

People of the State of Illinois, appellee, v. Andrew J. Schott, John L. Lee and James E. Sutton, appellants
Petition for rehearing denied.

LOREN J. STROTZ
Clerk

Julius Lucius Echeles
Patrick E. Ward
Edward N. Morris
Phyllis J. Perko

APPENDIX C

48775

(Seal of the Supreme Court of Illinois)

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
Springfield
62706

Clell L. Woods
Clerk

Telephone
Area Code 217
782-2035

September 29, 1976

Mr. Julius Lucius Echeles
Attorney at Law
35 East Wacker Drive
Chicago, Ill. 60601

No. 48775—People State of Illinois, respondent, vs. Andrew P. Schott, Jr., et al., petitioners. Leave to appeal, Appellate Court, Second District.

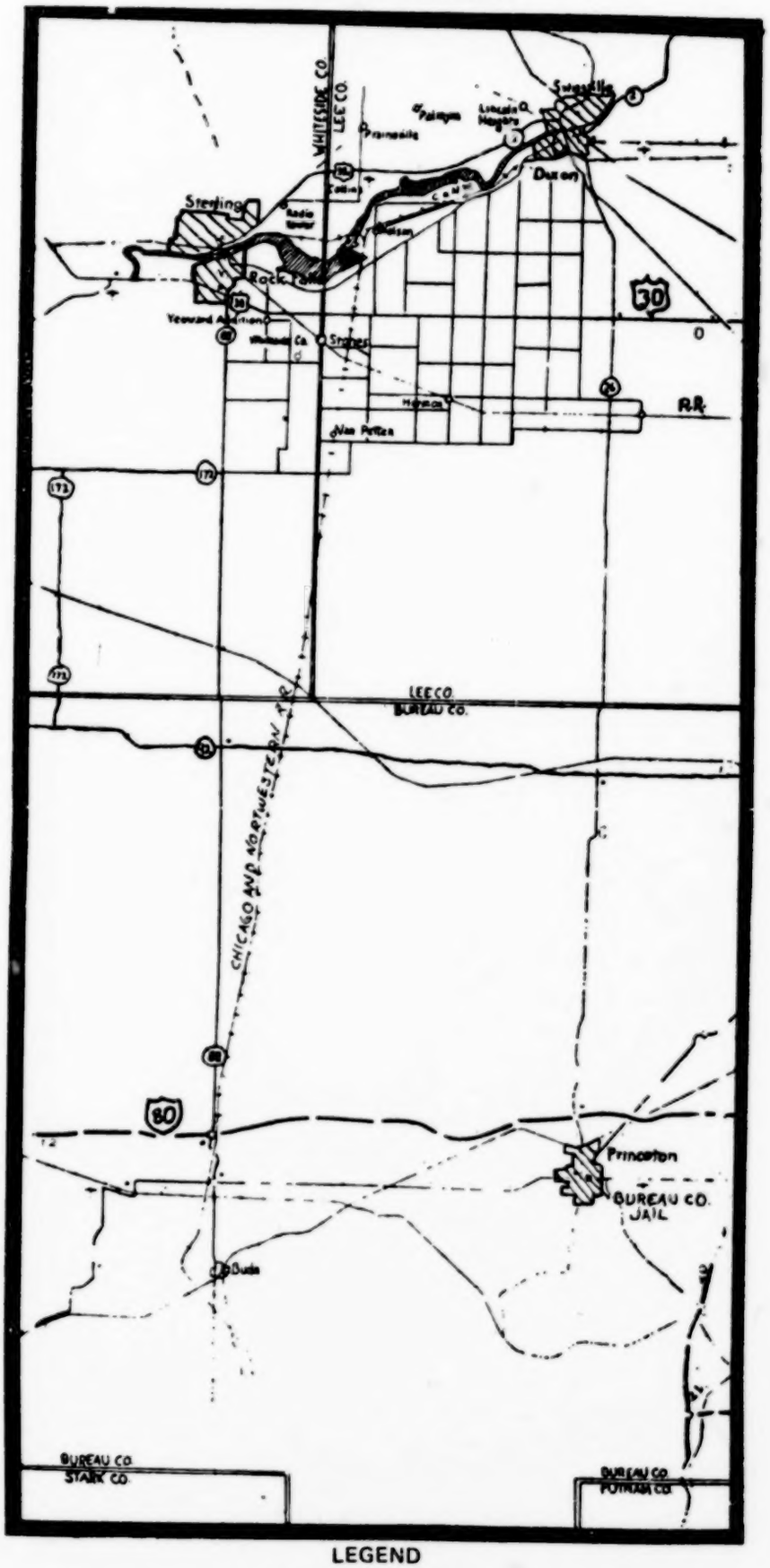
You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

APPENDIX D

Map of Pertinent Area *



LEGEND

Roads
County Lines
Evidence recovery point— Nelson black top

Scale: 1: 312,500
Scale 1 in. = 5 mi.

Route Markers: Interstate, U. S., State

*Black and white reproduction of a map obtained from Rand McNally, Inc.